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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1987

WALTER REX CADBY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

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QUESTIONS PRESENTED

WHETHER THE NEED TO LOCATE CAR KEYS BELONGING TO A WOMAN WHO WAS ADMITTEDLY TOO INTOXICATED TO DRIVE CONSTITUTED EXIGENT CIRCUMSTANCES SUFFICIENT TO JUSTIFY A WARRANTLESS SEARCH OF A PRIVATE HOME?

WHETHER A SEARCH WARRANT AFFIDAVIT WHICH CONTAINS ONLY THE STATEMENT OF AN INFORMANT WHO IS KNOWN TO BE NOT CREDIBLE, SUPPORTED BY UNLAWFULLY—OBTAINED EVIDENCE AND INTENTIONAL MISREPRESENTATIONS ESTBLISHES PROBABLE CAUSE WHERE THE CREDIBILITY INFORMATION HAS BEEN OMITTED?

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State v. Cadby, 512 So.2d 987 (Fla. 4th DCA 1987).

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 USC Section 1257(3) and Rule 17.1(b), Supreme Court Rules.

The decision of the Fourth District Court of Appeal, rendered on August 12, 1987, (App. E) and the denial of the Petition for Rehearing by that Court on September 28, 1987 (App. F), constitute the decision of a state court of last resort under this Court's interpretation contained in *Powell v. Texas*, 392 US 514, 517, *reh'g. denied*, 89 S.Ct. 65 (1968).

The Fourth District Court of Appeal affirmed the trial court's ruling without opinion. (App. E). Under Article V of the Florida Constitution and Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure, the Florida Supreme Court has no discretionary jurisdiction to review district court opinion in which conflicts with other Florida decision are not "expressly and directly" set forth. A written district court opinion in a prerequisite to discretionary review by the Florida Supreme Court. Committee notes, Rule 9.030, Florida Rules of Appellate Procedure (1980 amendment). The Petitioner therefore has no right to seek review in the highest state court.

The decision appealed from involved the resolution of the legality of a search under the Fourth Amendment to the United State Constitution.[1] The decision of the Court

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[1]Article I, Section 12 of the Florida Constitution provides:

> This right [to be free from unreasonable searches] shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissable in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the

below conflicts with the decision of several federal circuit courts of appeal, as set forth in this Petition.

The Constitutionl provision involved in this case is the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in thier persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(footnote 1 continued)

the 4th Amendment to the United States Constitution.

Therefore, there is no independent state ground upon which the federal question was or could have been decided.

STATEMENT OF THE CASE

A. *PRELIMINARY STATEMENT*

In this brief, the Petitioner, Walter Rex Cadby, will be referred to as "Cadby". The Respondent, the State of Florida, will be referred to as "State".

References to the Record on Appeal are designated "R" followed by the volume and page numbers. The transcript of the Change of Plea hearing held June 10, 1986, is referred to as "Tr." followed by the page number. References to the search warrant, search warrant affidavit and inventory and return, are noted as "Supp.R." Documents attached in the appendices are identified.

B. *COURSE OF PROCEEDINGS AND DISPOSITION*

On May 5, 1984, Petitioner Cadby's residence was searched and physical evidence was seized by members of the Hollywood, Florida Police Department. The evidence was seized pursuant to an initial warrantless search and a subsequently obtained search warrant issued by Circuit Judge Robert W. Tyson, Jr. (Supp.R.) (App.B). The actions of the officers in conducting a preliminary warrantless search of the residence and in filing a false search warrant affidavit form the basis for this Petition.

Cadby was charged with one count of possession of cocaine[2] and one count of possession of hashish [3] in the case of *State v. Cadby,* Case No.: 84-5133 CF-10-Korda (Fla. 17th. Jud. Cir.). (R.III:205).

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[2] Fla. Stat. Sections 893.135 (1)(b)(2), 893.03 (2)(a)(4), and 893.13 (1)(a)(1).

[3] Fla. Stat. Sections 893.03 (1)(c)(3), 893.13 (1)(e), and 893.13 (1)(f).

On April 16, 1985, Cadby filed his Motion to Suppress, seeking suppression of all physical evidence obtained as a result of the May 5th searches. (R.III:207-209).[4] An evidentiary hearing was held on Cadby's Motion to Suppress before the Honorable Lawrence L. Korda on February 21, 1986 (R.I.) and March 20, 1986. (R.II.). The trial court orally denied Cady's Change of Plea Hearing, Judge Korda orally pronounced his decision denying the Motion. (Tr.14). On February 4, 1987, Judge Korda entered a written Order denying the Motion nunc pro tunc June 9, 1986. (App.D). Cadby pled guilty to attempted trafficking in cocaine, reserving the right to appeal the trial court's denial of his Motion to Suppress. (R.III:294) (Tr.14). Cadby was sentenced to serve a term of four and one-half (4 ½) years. (R.III:295) (Tr.12). The trial court has permitted Cadby to remain free on bond during the pendency of the appeal. (Tr. 12-13).

Cadby filed his Notice of Appeal to the Distrct Court of Appeal, Fourth District of Florida, on June 25, 1986. The Fourth District Court of Appeal filed its decision affirming the trial court's ruling on August 12, 1987 in the case of *Cadby v. State,* Case No.: 4-86-1506 (Fla. 4th DCA). *Cadby v. State,* 512 So.2d 987 (Fla. 4th DCA 1987). (App. E). Cadby's Petition for Rehearing was denied on September 28, 1987. (App. F).

The Notice of Petition for writ of certiorari to this Court was filed on October 28, 1987. (App. G).

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[4] As a result of the warrantless search a drinking straw, an electric scale, a screen and cocaine residue were seized. The remaining items listed on the Inventory and Return on Search Warrant were seized as a result of the execution of warrant. (Supp.R.) (App.C)

STATEMENT OF FACTS

I. *THE WARRANTLESS SEARCH*

At. 12:18 p.m., on May 5, 1984, Officer John Cummings of the Hollywood, Florida Police Department and his backup responded to a domestic disturbance call at Petitioner Cadby's house. (R.I:7-8, 16).[5]

Shortly after the police arrived, the couple was separated and they reached an agreement that Ms. Weiland would gather her belongings and leave. (R.I:10, 18). While Ms. Weiland was collecting her personal effects, Officer Cummings followed her around the bedroom area. (R.I: 13).

While Ms. Weiland and Officer Cummings were in one of the bedrooms, she blurted out that Cadby was "no good", that he was a drug dealer and that he kept narcotics, cash and guns in a floor safe in the next bedroom. (R.I: 11-14).

At this point, Officer Cummings admits that Cadby posed no threat to either the officers or Ms. Weiland. (R.I: 17-19). Weiland had possession of her belongings, and was prepared to leave. (R.I: 18). But, she couldn't find her car keys.

Officer Cummings, as well as every police officer who subsequently arrived on the scene, testified that Ms. Weiland was too drug-intoxicated to drive and that even if they had found the car keys, they would not have let her use them. (R.I:20, 68, 135, 161). In spite of this, Officer Cummings began to search the entire house for the car

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[5] Cadby does not challenge the officers' initial entry. Cadby consented to entry. (R.I: 19, 16).

keys. The wide ranging "search for the car keys" would eventually last for one to one and one-half hours, ending only when drugs and paraphernalia were found and the keys were apparently forgotten.

Between 1:30 and 1:45 p.m., Dectective Gregory Brillant, a Hollywood Florida Police Department narcotics detective, entered the house. (R.I: 134). When he arrived, the officers already on the scene were still searching for Ms. Weiland's car keys. (R.I: 134). Detective Brillant walked through the home and, at approximately 2:00 p.m., he discovered the paraphernalia and residue on the kitchen table. (R.I: 135). To the best of his knowledge, no drugs had been found prior to his arrival. (R.I: 137).[6]

Detective Brillant made the decision to arrest Cadby. (R.I: 139-140). Detective Brillant asked Cadby for permission to search the house and Cadby refused. (R.I: 165) Cadby was removed from the home at approximately 2:30 to 3:00 p.m. (R.I: 81). Shortly thereafter Detective Brillant left the house to seek a search warrant from Circuit Court Judge Robert W. Tyson, Jr.

H. *THE SEARCH WARRANT*

The search warrant affidavit sworn to by Detective Brillant contains statements that were proved to be false at the Suppression Hearing. Each such statement is set out below along with the evidence presented at the hearing.

> "That when Ofc. Cummings arrived at the entrance door of the residence, he was invited in by

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[6] Officer Cummings, the first officer on the scene, confirmed Detective Brillant's testimony. Cummings testified that he didn't see the paraphernalia and wasn't aware that anyone had seen the evidence until after Detective Brillant was already on the scene. (R.I: 24-25).

> the male occupant thereof, later identified as Walter Rex Cadby, Cummings observed narcotics paraphernalia on the kitchen table together with a white powdery substance believed to be suspected cocaine." (Supp.R.)(App.A).

It is undisputed that this allegation is false. Cummings testified that he was not in a position to see the evidence until he had already entered through the kitchen door during his search for the car keys. (R.I:47). He did not see the evidence until after Detective Brillant arrived on the scene at 1:50 p.m., over an hour and a half after Cummings had first entered the home. (R.I:22-24, 33).

Based upon Detective Brillant's testimony at the hearing, it is clear that he knew that this allegation was false. He testified that he found the paraphernalia and residue after he had been on the scene for some time between five and twenty minutes. (R.I:135). He further testified that to the best of his knowledge, no drugs had found before he arrived. (R.I: 137).

> "The officers were permitted by Walter Cadby to look into every room of the residence except the southeast corner bedroom, the door of which he closed and locked." (Supp.R.) (App.A).

This statement mischaracterizes the warrantless search as consensual. It is undisputed that Cadby never consented to any search of any part of the residence, much less the entire home. (R.I:20). Cadby had not consented to Officer Cummings' search of the bedroom area. He simply did not attempt to stop Officer Cummings when he accompanied Ms. Weiland into this part of the house (R.I:20). Officer Cummings asked Cadby for permission to search the room pointed out by Ms. Weiland and Cadby refused. (R.I:14). He closed and locked the door to the room in question. (R.I:14, 27-28).

In addition to the misrepresentation that Cadby affirmatively granted permission to search, the affidavit omits the fact that Cadby had unequivocally withdrawn any perceived consent on four separate occasions.

After refusing permission to search the bedroom referred to by Ms. Weiland, Cadby ordered Officer Cummings to leave. (R.I: 14, 27-28). A supervisor, Sergeant Wayne Sauvola, arrived at the house at 12:55 p.m. (R.I: 58-59). Officer Cummings did not tell the Sergeant that Cadby had previously ordered him to leave. (R.I:66). However, Cadby later told the Sergeant at himself to leave the house. (R.I: 68).

Between 1:15 and 1:25 p.m., Cadby's New York attorney, Stanley Sliwa, spoke by phone with Sergeant Sauvola, who stated that Cadby was not under arrest at that time, that the disturbance was over, and that no contraband had been found on the premises. (R.II: 181-182, 186-187). During the course of the conversation, Attorney Sliwa twice ordered Sergeant Sauvola to "vacate the premises." (R.II: 187). Sergeant Sauvola refused, stating that they were waiting for a search warrant. (R.II:187).[7]

When Cadby's permission to search the house was finally requested after his arrest, he refused. (R.I: 165).

> "While in front of the residence, your Affidavit spoke with a female who requested to purchase from "Rex" (owner of the above-mentioned residence) some "base" cocaine . . ."
> (Supp.R.) (App.A).

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[1] In fact, no warrant was sought until Detective Brillant later arrived on the scene and discovered the paraphernalia (R.I:158).

The female, later identified as Sharon Gano, was eventually located and she testified at the hearing. She testified that this version of the meeting with Detective Brillant was false. According to Ms. Gano, when she arrived at the house, she saw police cars and uniformed officers on the scene and observed Ms. Weiland lying on the floor of the porch. Detective Brillant approached her car, identified himself as a friend of "Rex' and asked if she was there to buy cocaine. She replied, "no". (R.I:99). Detective Brillant then "propositioned" her and she gave him her business card. There were no further references to cocaine. The remainder of the conversation was limited to a "sales pitch" for her sexual services. (R.I:102). She never told Detective Brillant that she was there to buy cocaine. (R.I:104-105).

Ms. Gano was a very credible witness. The best evidence of her truthfulness is that she made an admission against her penal interest by testifying she was a prostitute, even after the trial court had advised her of her Fifth Amendment rights. (R.I: 107-109).

The issuing Magistrate, Judge Tyson, was openly skeptical about Detective Brillant's account of this conversation with Ms. Gano. (R.I: 151). In response to Judge Tyson's expression of disbelief, Brillant produced the business card. (R.I: 151). It appears that Judge Tyson relied upon this allegation in making his probable cause determination, since this is the only portion of the affidavit that he questioned Brillant about. When Detective Brillant showed the judge the business card, he signed the warrant. (R.I: 151).

Affiant Brillant's actions after the issuance of the search warrant further demonstrated an absence of good faith. After the charges against Cadby had been filed, Brillant refused to turn over Ms. Gano's business card to

either the defense or to the State, based upon his assertion that he was conducting an ongoing investigation. (R.I: 144). Therefore, the card was withheld from discovery for over nine months. (R.I: 144-145). However, at the Suppression Hearing he admitted that his "investigation" was never assigned a case number, that he kept no file on the case and that his investigation consisted solely of his making two or three telephone calls over a six month period to the number listed on the card. (R.I: 146). Ms. Gano confirmed that she spoke to Detective Brillant only once after their initial meeting. At that time, she told him that she had gone out of business. (R.I: 104).

Detective Brillant's refusal to disclose the witness' identity to either the defense or the state on the basis of the sham "investigation" demonstrates that the inclusion of the false version of their encounter in the Affidavit was something more than mere negligence or inadvertence. (R.I: 144-146).[8]

"While in front of the residence, your affiant

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[8] After Cadby had been arrested, Detective Brillant made an attempt to entrap a bystander at the scene, further demonstrating the lack of good faith and disregard for individuals' rights that surrounded the search. At about 3:30 p.m., Cadby's neighbor, Joe Bencivenga went to the house to check on Ms. Weiland. (R.I: 84). He was approached by a man who purported to be Cadby's friend. (R.I: 84). Bencivenga later learned that the man was a plainclothes police officer. (R.I: 86). The officer told Bencivenga that he had found cocaine in the bedroom, and that if Bencivenga would walk around to the side of the house, he would hand it to him to "lighten the load." (R.I: 84-85). Bencivenga refused and walked away. (R.I: 84). Detective Brillant confirmed that, posing as Cadby's friend, he spoke to neighbors and others who came on the scene. (R.I: 163-165). He did not deny that he offered to pass drugs to Bencivenga. When questioned about the incident, all he could say was that he was not sure whether he had or not. (R.I: 167).

> . . .also spoke with neighbors who stated that they were aware of the narcotics transactions occurring at the residence. Det. M. Baerga of the Hollywood Police Department was contacted by an anonymous caller who advised him of the whereabouts of the cocaine hidden within the residence." (Supp.R.) (App.A).

Brillant admitted that he did not know these neighbors' names, their addresses of the basis or their knowledge. (R.I: 152-153).

Detective Baerga made no report of the alleged anonymous phone call. (R.I: 154). Detective Brillant did not know the caller's identity, sex, or the basis of his or her knowledge. (R.I: 155). The caller did not provide any information about the quantity or exact location of the drugs which he or she alleged were in the home. (R.I: 155-156). Detective Brillant had no idea of when this call was supposedly made. (R.I: 157). The State did not offer Detective Baerga's note into evidence, nor did it call Detective Baerga as a witness.

Unlike the previous allegations, there is no affirmative evidence that these statements are false. They are, however, devoid of any indicia of reliability. Cadby's position is that they cannot be used to establish probable cause or, due to their vagueness, even to corroborate other statements contained in the Affidavit.

> "Further your Affiant was also advised by Toni Weiland, a resident of this location, that her boyfriend, Walter Rex Cadby, kept all his cocaine in the southeast corner bedroom. . . ." (Supp.R.) (App.A).

The problem here is not the statement that was included in the search warrant, but rather the information

regarding the informant's demonstrated lack of credibility that was left out.

Shortly after the initial entry, Ms. Weiland told the police that Cadby had tried to murder her by sticking a hypodermic needle into her arm. (R,I: 11, 158). Although several thorough searches were made of the house before the affiant arrived, no needle was ever found. (R.I: 11, 30-31, 62). The informant had falsely accused Cadby of a more serious crime, attempted murder, only minutes before she made her statement about the presence of drugs. (R.I: 11, 30-31). Detective Brillant was aware of her prior accusation when he prepared the Affidavit. (R.I: 158).

Further, the informant's mental condition at the time she made the statement indicated a credibility problem. Weiland was described by the officers, including Detective Brillant, as being "hysterical", and "high". (R.I: 16, 17, 67, 134-135, 139). She told affiant Brillant that she had not slept in two to three days, and that she believed Cadby was seeing another woman. (R.I: 158-159). She eventually "fell asleep" on the floor of the porch and didn't get up until midnight of that night. (R.I: 17, 86, 101, 160-161).

ARGUMENT AND AUTHORITIES

I

THE WARRANTLESS SEARCH OF CADBY'S HOME WAS UNLAWFUL. THEREFORE, THE ITEMS SEIZED SHOULD HAVE BEEN SUPPRESSED AND ALL REFERENCE TO THEM SHOULD HAVE BEEN STRICKEN FROM THE SEARCH WARRANT AFFIDAVIT

The state asserted the exigency exception as its justification for the warrantless search for the car keys

that eventually led to the discovery of the paraphernalia evidence. A majority of the Fourth District Court of Appeal panel agreed with the State's rationale. (App. F) [9] However, this decision conflicts with Circuit Court interpretations of the exigency exception as first set out by this court in *Mincey v. Arizona*, 437 U.S. 385 (1978).

In *Mincey*, this court explained that an exception to the warrant required exists when the police are faced with an immediate need to respond to an emergency. 437 U.S. 385. Any evidence that is in plain view while the officers are conducting "legitimate emergency activities" may be seized. *Id.* at 392-393.

In *United States v. Dart*. 747 F.2d 263, 267 (4th Cir. 1984), the Circuit Court catalogued the type of situations that have been recognized to be legitimate exigent circumstances, so as to justify a warrantless search: responding to an emergency call, hot pursuit of a fleeing felon, imminent destruction of evidence, the belief that a killer is still at a homicide scene, and the need to protect life or avoid serious injury. The type of case to which the exigency exception was meant to apply is illustrated in *United States v. Mayes*, 670 F.2d 126 (9th Cir. 1982), where a limited search for an object that had been removed from a child's throat was required to determine whether life-saving surgery was necessary.

Clearly, the "need" to find car keys belonging to someone who is too drug-intoxicated to drive does not rise to the level of an emergency, so as to make an otherwise unlawful warrantless search objectively reasonable.

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[9] One member of the panel found that the initial search was unlawful. *Cadby v. State*, 512 So.2d 987 (Fla. 4th DCA 1987) (J. Anstead, dissenting in part).

Cadby recognizes that the earlier domestic dispute could have been considered an "emergency". However, the undisputed testimony at the suppression hearing proved that any emergency situation that may have once existed had long since been resolved by the time that the search that yielded the evidence began. (R.I: 17-19). Shortly, after the police arrived, the couple had been separated and they had reached an agreement that Ms. Weiland would leave. (R.1:18). At this point, Cadby was being detained, and there was no threat to Ms. Weiland's or the officers' safety. (R.I: 18-19, 29).

The Ninth Circuit considered a similar situation in *United States v. Dugger,* 603 F.2d 97 (9th Cir. 1979). There, the police tracked a participant in a violent argument back to his apartment. The man called out to them that he would be right out and may, or may not, have consented to their entry. The officers located the man in his bedroom and proceeded to search the rest of the apartment. *Id.* at 98. The Court concluded that while the officers may have been initially confronted with an emergency need to determine whether the man was injured, once he responded that he was alright and was coming out, any excuse of an emergency dissipated. *Id.* at 99-100.

Similarly, in *Dart,* the court found that once the officer had determined that no immediate danger existed, the exigent circumstances "evaporated". 747 F.2d at 268. Once the emergency was resolved, the only way the officer could lawfully perform a search for evidence of a crime was to secure the area while he obtained a search warrant. *Id.* at 268.

Here, even if the officers truly believed that Cadby posed a continuing threat to Weiland, the car keys were not the solution to the emergency. The nature of this "emergency" required that an officer stay with and guard

the suspect, not rummage through his belongings. If the officers wanted to conduct an investigatory search upon Ms. Weiland's statement, their only lawful option was to continue to guard Cadby and his home and attempt to obtain a warrant within a reasonable time.

The fact that a warrant was eventually obtained does not cure the defects in the initial unlawful search. *Dart*, 747 F.2d at 270. If anything, the fact that a warrant was subsequently obtained after the damage to Cadby's Fourth Amendment rights had already been done, indicates an awareness on the officers' part of their constitutional responsibilities. *Id.* at 270-271. Their initial disregard or these responsibilities is therefore even more disturbing. *Id.*

Because the tainted evidence obtained during the warrantless search formed at least part of the basis for the Affidavit upon which the warrant was issued, the references should have been stricken from the Affidavit when the probable cause determination was reviewed. *Id.* at 270; *United States v. Gaultney*, 656 F.2d 109, 110 (5th Cir.), *reh'g*, 664 F.2d 1241 (5th Cir. 1981). The majority of the District Court panel erred in upholding the warrantless search and in considering the references to the unlawfully obtained evidence in finding that the search warrant Affidavit established probable cause.

II

THE SEARCH WARRANT AFFIDAVIT CONTAINED INTENTIONAL MATERIAL MISREPRESENTATIONS OF FACT

The District Court's decision upholding the search warrant conflicts with decisions of federal courts of appeal, in particular, with a series of cases out of the Ninth Circuit which have applied this Court's decision in *Franks*

v. Delaware, 438 U.S. 154 (1978).

Statements contained in a search warrant affidavit which have been shown to be false must be stricken from the affidavit. *Franks v. Delaware,* 438 U.S. 154 (1978). In this case, once the false statements are stricken, all that is left is the informant's accusation. The Affidavit omits all facts relating to the informant's proven lack of veracity. These facts were known to the affiant at the time the Affidavit was prepared.

Since the product of a material omission is the same as that of an affirmative misstatement -- a false and misleading affidavit -- ommisions are also subject to the *Franks* rule. *United States v. Condo,* 782 F.2d 1502, 1506 (9th Cir. 1986); *United States v. Stanert,* 762 F.2d 775 (9th Cir.), *modified,* 769 F.2d 1410 (9th Cir. 1985); *United States v. Haimowitz,* 706 F.2d 1549, 1556 n.3 (11th Cir.), *reh'g denied,* 712 F.2d 457 (11th Cir. 1983), *cert. denied,* 464 U.S. 1069 (1984). The inclusion of only half-truths prevents the issuing magistrate from performing his constitutionally-mandated function. *United States v. Esparza,* 546 F.2d 841, 843 (9th Cir. 1976).

The Affidavit prepared by Detective Brillant, which was relied upon by the issuing magistrate in making his probable cause determination, contains numerous factual misrepresentations and omissions. (*See,* Statement of Facts, *supra.*).

The Affidavit misled the issuing magistrate to believe that the officers had obtained the paraphernalia evidence by a combination of plain-view sighting immediately upon entry and a consensual search. Ms. Weiland was portrayed as an informant with unproven credibility and reliability, rather than being a drug-intoxicated and hysterical woman with a motive to lie, who

had already falsely accused Cadby. Her accusation was allegedly corroborated by Brillant's false version of the Sharon Gano incident. The evidence at the suppression hearing established that these sworn allegations were false and that the affiant knew that the statements were false at the time he made them.[10]

Had the truth been known, it would have been of sufficient probative importance to warrant, at a minimum, further investigation into the issue of the existence of probable cause. *United States v. Davis,* 714 F.2d 896, 900 (9th Cir. 1983). In this case, it cannot be said that if the issuing magistrate had to base his decision solely upon Weiland's statement, standing alone, knowing the truth about her mental and physical condition, her motive to lie[11] and her previous false accusation, that he would have still found probable cause.

In those cases where the circuit courts have upheld search warrants despite the informant's undisclosed credibility problems, the reviewing courts have required some additional evidence to corroborate the informant's word. *United States v. Haimowitz,* 706 F.2d 1549 (11th Cir.

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[10] Contrary to his assertion as contained in the affidavit that Officer Cummings sighted the drug paraphernalia and residue immediately upon entry, Detective Brillant testified at the suppression hearing that no drugs had been found prior to his arrival. (R.I: 137). He knew that the informant had falsely accused Cadby of attempted murder and had personal knowledge of her mental condition and motive to lie. (R.I: 134-135, 139, 158-161). As a participant in the converstion with witness, Gano, he was certainly aware of the true facts concerning that incident.

[11] While bad motive does not automatically render the information useless, motivation is relevant to the determination of veracity. *United States v. Hodges,* 705 F.2d 106 (4th Cir. 1983). In *United States v. Lefkowitz,* 618 F.2d 1313 (9th Cir.), *cert. denied,* 449 U.S. 824 (1980), the reviewing court re-examined the probable cause determination by first inserting the information regarding motive into the affidavit and then by deleting the informant's statements entirely. *Id.* at 1317.

1983) (corroboration by credible witness); *United States v. Hodges*, 705 F.2d 106 (4th Cir. 1983) (photograph). Had this affidavit been held to the same standard, no such corroboration would have been found.[12] Because additional inquiry into the existence of corroborative evidence would have been required, further investigation would have had to occur before the warrant could have been issued. Therefore, under the *Davis* analysis, the omissions were material to the determination of probable cause. 714 F.2d at 900.

Here the *officers* concluded that despite her credibility problems, they would portray Weiland as a reliable informant. They had the opportunity to weigh the factors that supported and detracted from her credibility and they decided to supplement her story with false allegations and unlawfully obtained evidence.

They took the probable cause decision away from the issuing magistrate when they failed to provide him with a sufficient factual basis for exercising his judicial responsibility to make that determination for himself. By so doing, they rendered the warrant void. *Franks v. Delaware*, 438 U.S. 154 (1978).

Where, as here, the issuing magistrate is misled by false information contained in the affidavit, suppression is the appropriate remedy. *United States v. Stanert*, 762 F.2d 775, 780 (9th Cir.), *modified*, 769 F.2d 1410 (9th Cir. 1985). In reaching the decision in *Franks v. Delaware* to apply the exclusionary rule to false affidavits, this Court considered the need to deter such police misconduct. The Court rejected alternative sanctions as being inadequate to prevent the abuses found in this case. 438 U.S. at 169.

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[12] At least no corroboration existed in the lawfully obtained, true evidence.

This Court should not validate the intentional misrepresentations, the manipulation of the court system, and the utter disregard for the constitutional rights of the Petitioner which have tainted the State's evidence. Suppression is the only effective remedy for the abuses that occurred in this case.

In reaching its decision, this Court should examine the cumulative effect of the warrantless search, the omissions and misrepresentations, and the post-search cover-up described above. *United States v. Kiser*, 716 F.2d 1268, 1274 (9th Cir. 1983); *United States v. Esparza*, 546 F.2d 841, 844 (9th Cir. 1976). Because the officers' actions made it impossible for the issuing magistrate to exercise his independant judgment, the search warrant should be declared void, and the decisions below should be reversed. *Esparza*, 546 F.2d at 844.

CONCLUSION

Wherefore, based upon the foregoing authorities, Petitioner, Walter Rex Cadby, respectfully requests that this Honorable Court accept jurisdiction over this matter, grant his Petition for Writ of Certiorari, and address the questions presented herein for review.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA	)	
	)	
	)	SS
	)	
COUNTY OF BROWARD	)	

AFFIDAVIT FOR SEARCH WARRANT

Before me, Robert W. Tyson, Jr., a Judge of the seventeenth Judicial Circuit, in and for Broward County, Florida, personally appeared Detective Gregory Brillant, of the City of Hollywood, County of Broward, Florida, Police Department, who being by me first duly sworn, deposes and says that he has probable cause to believe that at the premises described as:

> A single family dwelling of CBS construction, the outside walls of which are stucco finished and off white in color. The residence has trim painted burgundy and the roof is burnt colored shingle. The front of the dwelling faces south with the entry door being of solid wood composition with an observation window in the door and the door is white in color. There is a large screened in porch on the front (southside) of the residence. The entry door (screened) is located on the west side of the porch. The numerals 6761 are written out in script on the facia board of the residence inside the screened in porch. ("Sixty seven sixty one") and are black in color. There is a red and white metal awning over a jalousie window which is located west of the screened in porch and on the

> southwest side of the residence. There is a red and white metal awning over a jalousie window loccated east of the screened in porch on the southeast side of the screend in porch on the southeast side of the residence. There is a black top driveway on the north side of Custer Street leading to the residence, said driveway is located on the west side of the residence. There is a large tree located on the front lawn. There is a tree on the east and west sides of the screened porch. There are jalousie windows on the west side of the residence running to the rear of the house. There is a window air conditioning unit on the southeast corner of the house. The house is approximately 200 feet east of North 68th Avenue on the north side of Custer Street, Hollywood, Broward County, Florida. A person could get to this residence by travelling south on N. 68th Avenue in Hollywood, Florida, from Stirling Road to Custer Street in Hollywood, Florida. The residence in question is the fourth house east of N. 68th Avenue and is on the north side of the Street.

the laws relating to narcotics or drug abuse is being violated therein, and property is being stored and concealed therein, to wit: Cocaine, contrary to the laws, to wit: Possession of Cocainne, F.S. 893.03(2), F.S. 893.13(1)(e).

Affiant's reason for his belief that the laws of the State of Florida are being violated as stated above and the facts establishing the grounds for this Affidavit and the probable cause for believing that such facts exits are as follows:

> Your Affiant has been employed by the Hollywood Police Department for seven years and at present is assigned to the Vice, Intelligence and Narcotics Unit. During this time, your Affiant has made numerous narcotics

arrests and has been involved in numerous narcotics related investigations. During said period of time, your Affiant has on many occasions observed and tested cocaine and is familiar with the physical properties, order and common packaging methods of cocaine. Your Affiant was requested to respond to 6761 Custer Street, Holywood, Florida, on May 5, 1984 at approximately 1300 hours with respect to narcotics violations at this location. Upon arrival at said residence, your Affiant spoke with Sgt. W. Sauvola and Ofc. J. Cummings of the Hollywood Police Department and was advised of the following:

Ofc. J. Cummings arrived at said location at 12:18 P.M. on May 5, 1984 in response to a domestic disturbance at said location. That when Ofc. Cummings arrived at the entrance door of the residence, he was invited in by the male occupant thereof, later identified as Walter Rex Cadby, Cummings observed narcotics paraphernalia on the kitchen table together with a white powdery substance believed to be suspected cocaine.

Ofc. Cummings observed the male and female occupant, later identified as Toni Weiland, to be in a physical and verbal altercation. Shortly after entering the residence, Weiland stated to Cummings that there was a gun in the residence and a large amount of cocaine in the house.

Your Affiant responded to said residence and was advised by Ofc. J. Cummings and Sgt. W. Sauvola that they had noticed narcotics paraphernalia located on the kitchen table. Your Affiant upon, walking through the kitchen/dining area noticed a small amount of white powdery substance, believed to be cocaine located on the paraphernalia on the kitchen table. The substance was valtox tested with a positive reaction for

cocaine. Also noticed in plain view in the kitchen area was a hot box test kit and acreens with suspect cocaine residue which were also tested by valtox with positive results.

While in front of the residence, your Affiant spoke with a female who requested to purchase from "Rex" (owner of above mentioned residence) some "base" cocaine, and also spoke with neighbors who stated that they were aware of the narcotics transactions occurring at the residence.

Det. M. Baerga of the Hollywood police Department was contracted by an anonymous caller who advised him of the whereabouts of the cocaine hidden within the residence. Let it be noted that Det. Baerga is a robbery Detective and was in the Hollywood Police station when this call was received. Further your Affiant was also advised by Toni Weiland a resident of this location that her boyfriend, Walter Rex Cadby kept all his cocaine in the southeast corner bedroom, the room which he had denied the police officers entry to. The officers were permitted by Walter Cadby to look into every room of the residence except the southeast corner bedroom, the door of which he closed and locked. The female Toni Weiland further advised your Affiant that Walter Cadby also had a floor safe in the closet under the carpet in said bedroom, in which he stored large amounts of cocaine and weapons.

WHEREFORE, Affiant prays that a Search Warrant be issued commanding the Sheriff of Broward County, Florida and his Deputies and all Police Officers of the City of Hollywood, and the Director of the Florida Department of Law Enforcement or his duly constituted Agents, and all Police Officers in Broward County, and all Officers of the Florida Highway Patrol, with the proper and necessary assistance, to search the above described premises and curtilage thereof for the aforesaid property; to wit; Cocaine,

contrary to the laws, to wit: Possession of Cocaine, serving this Search Warrant in the daytime or the nighttime or on Sunday as the exigencies of the occasion may demand or require, and to search said premises and curtliage thereof for the property heretofore described, and if the same be found upon the premises and curtilage there, to seize the same as evidence and to arrest any persons in unlawful possession thereof.

/s/ Gregory Brillant
Detective Gregory Brillant

SWORN TO AND SUBSCRIBED
before me this 5th day of May,
1984.

/s/ Eobert W. Tyson, Jr.
CIRCUIT JUDGE *Tyson*

APPENDIX B

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA	)	
	)	
	)	SS
	)	
COUNTY OF BROWARD	)	

SEARCH WARRANT

IN THE NAME OF THE STATE OF FLORIDA, TO ALL AND SINGULAR:

The Sheriff of Broward County, Florida, or his Deputies and all police officers in Broward County, Florida to include police officers of the City of Hollywood Police Department, and the Director of the Florida Department of Law Enforcement or any of his duly constituted Agents, and all officers of the Florida Highway Patrol.

Affidavit having been made before me by Detective Gregory Brillant, of the City of Hollywood Police Department, Hollywood, Broward County, Florida, that he has probable cause to believe and does believe that at the premises described as:

> A single family dwelling of CBS construction, the outside walls of which are stucco finished and off white in color. The residence has trim painted burgundy and the roof is burnt colored shingle. The front of the dwelling faces south with the entry door being of solid wood composition with a observation window in the door and the door is

white in color. There is a large screened in porch on the front (southside) of the residence. The entry door (screened) is located on the west side of the porch. The numerals 6761 are written out in script on the facia board of the residence inside the screened in porch. ("Sixty seven sixty one") and are black in color. There is a red and white metal awning over a jalousie window which is located west of the screened in porch and on the southwest side of the residence. There is a red and white metal awning over a jalousie window which is located west of the screened in porch and on the southwest side of the residence. There is a red and white metal awning over a jalousie window located east of the screened in porch on the southeast side of the screened in porch on the southeast side of the residence. There is a black top driveway on the north side of Custer Street leading to the residence, said driveway is located on the west side of the residence. There is a large tree located on the front lawn. There is a tree on the east and west sides of the screened porch. There are jalousie windows on the west side of the residence running to the rear of the house. There is a window air conditioning unit on the southeast corner of the house. The house is approximately 200 feet east of North 68th Avenue on the north side of Custer Street. Said residence is located at 6761 Custer Street, Hollywood, Broward, County, Florida. A person could get to this residence by travelling south on N. 68th Avenue in Hollywood, Florida, from Stirling Road to Custer Street in Hollywood, Florida. The residence in question is the fourth house east of N. 68th Avenue and is on the north side of the Street.

the laws relating to narcotics or drug abuse is being violated therein, and property is being stored and concealed therein, to wit: Cocaine, contrary to the laws to wit:

Possession of Cocaine, F.S. 893.03(2)(a). F.S. 893.13(1)(e).

NOW THEREFORE, the facts upon which the belief of said Affiant is based as set out in said Affidavit are hereby deemed sufficient to show probable cause for the issuance of a Search Warrant in accordance with said application of said Affiant.

And as I am satisfied that there is probable cause to believe that the laws of the State of Florida are being violated as aforesaid and that the above-described property is being concealed and stored on the premises above-described, I expressly find probable cause for the issuance of the Search Warrant.

THIS IS, THEREFORE to command you, Detective Gregory Brillant police officer for the City of Hollywood, Broward County, Florida, and all other police officers of the City of Hollywood as may be needed for assistance and all and singular the Sheriff and/or Deputy Sheriff's of the County of Broward, State of Florida, with proper and necessary assistance, to search the above described premises, and curtilage thereof, for the aforesaid property, to wit: Possession of Cocaine, serving this warrant and making the search in the daytime or the nightime or on Sunday, as the exigencies of the occasion may demand or require, with the proper and necessary assistance, and if the property above described be found there, to seize it and to arrest all persons in the unlawful possession thereof, leaving a copy of this Warrant and a receipt for the property taken and prepare a written Inventory of the property seized and return this Warrant and Inventory and bring the property and all persons arrested before a Count having competent jurisdiction of the offense within ten (10) days as required by law.

DONE AND ORDERED AT FORT LAUDERDALE, Florida, on this 5th day of May, 1984.

/s/ Robert W. Tyson, Jr.
Circuit Judge

APPENDIX "C"

INVENTORY AND RETURN ON SEARCH WARRANT

Received this search warrant on *May 5, A.D. 1984* and executed the same on *May 5, A.D. 1984,* at *10:12 P.M.* by delivering a true cxopy thereof to *6761 Custer St., Walter P. Cadby* and at the same time showing *him* this original search warrant and reading to *him* and explaining to *him* the contents thereof, and making diligent search as herein directed, upon which search I found: (type written copy)

(Handwritten Copy)

#1: Brown Cube-substance-suspect-Hash
#2: Red & White cooler Jug-containing a clear plastic baggie-containing white powdery-substance-suspect cocaine
#3: Tanish Brown pill vial containing white Powdery Substance-Suspect cocaine-valtox positive
#4: Marijuana Roach Cigarette
#5: Rolling papers
#6: Numerow paraphernalia
#7: Black Plastic case containing electric scales & weights
#8: Screen Paraphernalia with cocaine residue (Valtox Positive)
#9: Misc. papers
#10: Two (2) clear glass bottles containing an unknown liquid substance
#11: Brown glass bottle containing a liquid substance
#12: Blue Box telephone
#13: Three (3) plastic baggie containing suspect cocaine

I, *Evelyn T. Heath*, the officer by whom this warrant was executed do swear that the above inventory contains a true and detailed account of all the property, appliances, apparatus, paraphernalia and devices taken by me on said warrant.

/s/ Evelyn T. Heath

Sworn to and subscribed before me this
5th day of *May,* *A.D. 1984*
/s/ illegible notary

Witness to the removal of the above items _____.

APPENDIX D

Filed Feb. 4, 1986

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 84-5133-Cf-10
JUDGE: KORDA

STATE OF FLORIDA,

Plaintiff,

vs. ORDER

WALTER REX CADBY,

Defendant.

This cause having come before the Court on Defendant's Motion to Suppress, the Court having heard the evidence and argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant's Motion to Suppress is hereby *DENIED* nunc pro tunc June 9, 1986.

DONE AND ORDERED in Chambers, Broward County, Florida, on this 4 day of February 1987.

/s/ Lawrence L. Korda
LAWRENCE L. KORDA
CIRCUIT COURT JUDGE

Copies furnished to:

A TRUE COPY

Marc S. Nurik, Esquire
Peter Wilson, Esquire
Assistant State Attorney
Penny Brill, Esquire
Assistant Attorney General

APPENDIX E

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JULY TERM 1987

WALTER REX CADBY,	)	NOT FINAL UNTIL
	)	TIME EXPIRES TO
Appellant,	)	FILE REHEARING
	)	MOTION AND, IF
v.	)	FILED, DISPOSED
	)	OF.
	)	
STATE OF FLORIDA,	)	CASE NO.
	)	4-86-1506.
Appellee.		

RECEIVED
AUG 12 1987

Decision filed August 12, 1987

Appeal from the Circuit Court
for Broward County;
Lawrence L. Korda, Judge.

Marc S. Nurik and Susan R. Healy
of Law Offices of Marc S. Nurik,
Fort Lauderdale, for appellant.

Robert A. Butterworth, Jr.,
Attorney General, Tallahassee,
and Barry Weisman
Assistant Attorneys General,
West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

LETTS and DELL, JJ., concur.

ANSTEAD, J., dissents in part with opinion.

ANSTEAD, J., dissenting in part.

I agree that the trial court was correct in rejecting appellant's attack upon the search warrant. However, I believe the motion to suppress was well taken as to those items seized by the police in a search of appellant's home prior to the issuance of a warrant. As a practical matter this difference of opinion is of little consequence since the charges against the appellant were chiefly predicated upon the results of the search conducted pursuant to the warrant.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P. O. BOX A, WEST PALM BEACH, FL 33402

RECEIVED SEP 29 1987

WALTER REX CADBY

Appellant,

v. CASE NO. 4-86-1506

STATE OF FLORIDA

Appellee.

SEPTEMBER 28, 1987

BY ORDER OF THE COURT:

ORDERED that Appellant's September 8, 1987 motion for rehearing and/or clarification of decision is denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath

CLYDE L. HEATHE,
CLERK.

cc: Marc S. Nurik, Esq.

John W. Tiedemann, Ass't. Attorney General

IN THE DISTRICT COURT OF APPEALS

STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 4-86-1506

WALTER REX CADBY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOTICE OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

NOTICE IS GIVEN that WALTER REX CADBY, Defendant, Petitioner, invokes the discretionary jurisdiction of the United States Supreme Court to review the decision of this Court rendered on August 12, 1987, Petition for Rehearing and/or Clarification denied on September 28, 1987. The decision is in conflict with the decision of another state court of last resort and/or a Federal Court of Appeals within the meaning of Rule 17, Supreme Court Rules.

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.

CLYDE L. HEATH, CLERK
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

Per /s/ illegible
Deputy Clerk

FILED
OCT 28, 1987

Respectfully submitted,
KINGCADE & CAMPBELL, P.A.
Attorneys for Appellant
Suite 130 Commerce Center
324 Datura Street
West Palm Beach,
Florida 33401
(305) 659-7300

By: /s/ Susan R. Healy
SUSAN R. HEALY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of October, 1987, to JOHN TIEDEMANN, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401.

By: /s/ Susan R. Healy,
SUSAN R. HEALY,
Attorney at Law